In The

Supreme Court of the United States

October Term, 1973

No. 73-1676

ALBERT J. WAHBA,

Petitioner,

vs.

NEW YORK UNIVERSITY and SEVERO OCHOA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Albert J. Wahba, petitions that a writ of certiorari issue to review a final decision of the United States Court of Appeals for the Second Circuit (Appendix A, *infra*) affirming the decision of the lower court granting summary judgment for the respondents.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York Fed. Supp. appears in Appendix B, *infra.*

The opinion of the United States Court of Appeals for the Second Circuit Fed. 2d appears in Appendix A, *infra.*

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit (Appendix A, *infra*) is dated February 11, 1974. Jurisdiction is conferred on the Court by 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether respondent, New York University, was required to comply with the due process standards of the Fifth Amendment in administering a federally funded and regulated research project?

2. Whether the arbitrary dismissal of petitioner by respondents was a denial of due process of law?

3. Whether the arbitrary dismissal of petitioner by respondents was unlawful even without a direct government act?

4. Whether petitioner's arbitrary dismissal by respondents constituted punishment for his exercise of his First Amendment rights?

5. Whether the violation of rights secured by the Fifth Amendment may be made the basis for a claim of damages?

6. Whether respondents are immune from suit?

STATEMENT OF THE CASE

This case presents as stated by Judge Friendly "another variation on the pervasive theme of what constitutes government action."

Petitioner is an internationally recognized expert in the field of Biochemistry. He received his Ph.D in 1961 from Tufts University and has published innumerable scholarly papers in his specialized field. In January, 1963, petitioner was appointed an instructor of Biochemistry in the Department of Biochemistry at the New York University School of Medicine. By September, 1963, petitioner had been promoted to Assistant Professor and in January, 1966, he was appointed Research Associate Professor of Biochemistry in the Department. In this latter position, petitioner was in complete charge of a laboratory at the New York University School of Medicine. In addition, petitioner had under his direction and tutelage acting as his assistants, numerous graduate students and post-doctoral fellows engaging in specialized research. The research done by petitioner and his assistants was specifically concerned with "Enzymic Mechanisms in Biosynthesis" and was conducted as a project under a National Institute of Health (hereinafter NIH) grant from the United States Department of Health, Education and Welfare.

Respondent, New York University, is a corporation organized and regulated under the Education Laws of the State of New York. The aforementioned Department of Biochemistry is a department of the aforementioned School of Medicine which is a division of respondent, New York University. The Department of Biochemistry is substantially subsidized by federal and state financial aid which includes, but is not limited to, federal and state grants, loans, contracts, tax advantages and in particular, the aforementioned grant of the United States Department of Health, Education and Welfare, National Institute of Health, Grant AM-1845. In conducting training and

research in the field of biochemistry under this grant, the Department serves an important public purpose in helping to augment the medical knowledge of the nation.

Respondent, Severo Ochoa, at all times hereinafter mentioned was the Chairman of the said Department of Biochemistry.

On January 17, 1969, petitioner was invited, by a letter from John Cairns, Symposium Director of the Cold Spring Harbor Laboratory of Quantitative Biology to attend and give a talk at the 1969 Symposium of the organization, to be held June 5, to June 12, 1969. Respondent, Ochoa, knew of this invitation and did not disapprove of petitioner's attendance at the Symposium. Petitioner attended and at its conclusion was requested to submit manuscripts of his research for publication in the 1969 issue of the Cold Spring Harbor Symposia. In accordance with this request, petitioner submitted his manuscript for publication.

On September 2, 1969, respondent, Ochoa, after returning from Europe, told petitioner that he had no right to submit the manuscript without first having shown it to respondent, Ochoa, and without first having put respondent, Ochoa's name thereon. Respondent, Ochoa, then demanded that petitioner sign a letter which had been prepared by respondent, Ochoa and which was addressed to Dr. Watson of the Cold Spring Harbor Laboratory, requesting the recall of petitioner's manuscript. This letter also included the following statement:

> "Experiments performed after submission of the above manuscript, make it desirable to withhold its publication in the 1969 issue of the Cold spring Harbor Symposia."

Respondent, Ochoa, knew this statement to be totally false as no experiments, performed prior to the time respondent, Ochoa, confronted petitioner with this letter, would have contradicted any of the results contained in petitioner's manuscript. In fact, the actual reason respondent, Ochoa, tried to compel petitioner to withdraw the manuscript was because petitioner refused to include respondent's, Ochoa, name on the manuscript which presented the results of petitioner's researches.

Respondent, Ochoa, delivered to petitioner an ultimatum that unless he signed the letter by 9:00 the following morning, petitioner would have performed the last experiment of his life. At about noon of the following day, September 3, 1969, respondent, Ochoa, again demanded of petitioner that he sign the letter, which petitioner refused to do. Thereupon, respondent, Ochoa, ordered petitioner to come to his office immediately and physically shoved petitioner toward the office. Once again, and in extremely strong terms, respondent, Ochoa, ordered petitioner to sign the letter. Petitioner adamantly refused to do so and respondent, Ochoa, thereupon shouted at petitioner, "Get the hell out of here! You have 48 hours to clear out, and if not everything will be thrown out." Following this incident, respondent, Ochoa, called Dr. Watson at the Cold Spring Harbor Laboratory to demand that petitioner's manuscript not be published.

Petitioner appealed to Dr. Ivan Bennett, Vice President and Director of New York University School of Medicine, to recitfy the injustice done to him, but Dr. Bennett refused to contravene the arbitrary and wrongful actions of respondent, Ochoa. Thereafter, on October 29, 1969, petitioner received a letter from Miguel de Capriles on the stationery of the Vice President and Secretary of New York University informing him that his "University appointment as Research Associate Professor of Biochemistry" would not be renewed and acknowledging "with appreciation your contributions to the research and teaching programs of the School of Medicine." No reason for petitioner's dismissal was included in the letter.

Petitioner, on a number of occasions, requested a hearing from respondent, New York University, but the latter denied such request, refusing to justify or explain its action in dismissing him.

Upon permanently leaving the employ of New York University and the Department of Biochemistry, petitioner experienced considerable difficulty in finding alternative employment. He contacted no fewer than twelve prospective employers in the United States, all of whom said there was no position for him. After expending considerable time and effort, petitioner finally obtained a position in Montreal, Canada. His reasons for taking a position outside the country, at an isolated location where his working conditons are relatively inferior, stem from the wrongful, intentional and malicious conduct of respondents. Within academic circles, the dismissal of petitioner became widely known, all to the detriment of his reputation as an internationally known professor and

scientist. In sum, respondents' conduct has injured petitioner's personal and professional reputation and his ability to pursue his occupation and has interfered with his prospective economic advantages.

Thereafter this action by petitioner was commenced against respondents New York University and Ochoa. In his complaint petitioner alleged that respondents' conduct was arbitrary and capricious, in violation of lawful procedure and constitutes an abuse of discretion. Among other things, petitioner claimed that the action of dismissing him was taken without prior hearing, without adequate notice or specification of charges, without the presentation of evidence, without giving the petitioner the opportunity to present evidence in his own behalf or to cross-examine witnesses against him and in violation of the rights of petitioner secured by the First, Fifth, Ninth and Fourteenth Amendments of the Constitution of the United States.

Respondents admit that its medical center is the grantee institution under Research Grant AMO 1845 from the United States Department of Health, Education and Welfare and funds from the State of New York; and that it is responsible under its charter and under the Education Laws of the State of New York, for the operation of the Department of Biochemistry, and that said Department serves the public purposes of conducting training and research in the field of Biochemistry, among other purposes.

Respondents further admit that the aforesaid grant was conducted under and subject to the direction and control of and was the responsibility of respondent Ochoa.

Respondents in their answer raise questions of fact: that petitioner had no right to send his manuscript for publication without first showing it to Ochoa; and that this is a well recognized and required custom among scholars.

Respondents admit that Ochoa requested petitioner to withdraw one of his two manuscripts and that upon refusal to comply Ochoa prepared a letter for petitioner to sign recalling the manuscript. (This is the letter petitioner contends contained untrue statements and did not sign.) Thereupon Ochoa refused to allow petitioner to continue as a researcher in the Department of Biochemistry.

Respondents in their affirmative defense maintain that under the grant and policies of the Public Health Services, United States Department of Health, Education and Welfare, they share responsibility for the conduct of the research and the prudent use of grant funds for the purposes in the grant application and notice of grant awarding.

Respondents demanded judgment for two months salary paid to petitioner after his discharge. (Petitioner in his reply to the counterclaim maintained that these moneys were used to pay expenses in seeking other employment in Canada.)

REASONS FOR GRANTING THE WRIT

I.

Respondent, New York University, was required to comply with the due process standards of the Fifth Amendment of the United States Constitution.

The Due Process Clause of the Fifth Amendment limits the federal government to actions consistent with due process of law. *Murray's Lessee v. Hoboken Land Improvement Co.*, 18 How. 272 (1856). These limitations apply to the legislative, judicial and executive powers of the government and to officials who act under these powers. The due process limitations also applies to "non-governmental" bodies when it is ascertained that the "government . . .[has] become so involved in the conduct of these otherwise private bodies that their activities are also the activities of [the] government and performed under their aegis without the private body necessarily becoming either their instrument of their agent in a strict sense." *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 966 (4th Cir. 1963). The involvement of the government in private matters will be determined by "sifting facts and weighing circumstances" and by accumulating the effect of the government involvement. *Eaton v. Grubbs*, 329 F.2d 710 (4th Cir. 1964). Only in this way "can the non-obvious involvement of the [government] in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Evans v. Newton*, 382 U.S. 296, 299 (1966).

The courts have adopted several criteria for determining whether otherwise private action is federal or state action for the purpose of the Fifth and Fourteenth Amendments. One such factor is the extent to which the organization receives financial assistance from the government. *Simkins v. Moses H. Cone Memorial Hospital*, supra; *Griffin v. State Board of Education*, 239 F. Supp. 560 (E.D. Va. 1965); *Burton v. Wilmington Parking Authority*, supra; *Kerr v. Enoch Pratt Free Library, etc.*, 149 F.2d 212 (4th Cir. 1945); *Farmer v. Moses*, 232 F. Supp. 154 (S.D.N.Y. 1964); *Everett v. Riverside Hose Co.*, 261 F. Supp. 463, 468 (S.D.N.Y. 1966); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1968) (3 Judge Court), aff'd, 339 U.S. 571 (1968); cf. *Cooper v. Aaron*, 358 U.S. 1, 4 (1958). Federal aid was the determinative factor in *Simkins v. Moses H. Cone Memorial Hospital*, supra, (the two hospitals in question received 17.2% and 49.6% of their respective construction costs from federal funds), and in *Kerr v. Enoch Pratt Free Library*, supra, (government action was found since the government supplied the library with its financial "means of existence").

In the present case, petitioner was conducting research on a project which received all of its funds from the federal government. This project could not have existed without the HEW grant; in this case the government was definitely supplying the financial "means of existence" for what was outwardly a private operation. In addition, this government provision of funding was not a short-term or one-time phenomenon. From at least September, 1958, up to and through October, 1969, when petitioner was arbitrarily dismissed, the Department of Biochemistry,

under respondent, Ochoa's chairmanship, received research grants from HEW. These facts lead inexorably to the conclusion that financial aid from federal government was vital to the continued functioning of the Department of Biochemistry and its research activities.

A second factor for determining the fundamental character of an action in which the government's role is not obvious is the extent to which the authority of the private body to act is derived from and regulated by the government, *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1951); *Boman v. Birmingham Transit Co.*, 280 F.2d 531 (5th Cir. 1960). Thus, "When authority derives in part from Government's thumb on the scales, the exercise of that power by private persons become closely akin . . . to its exercise by government itself." *American Communication Ass'n v. Douds*, supra at 401. In *Pollak*, supra, the actions of a private bus company were deemed by the Court to be "federal" actions since the company was regulated to some extent by the government, which had granted the company the right to operate public transportation.

Respondents were granted authority by NIH to direct and administer the research project on which petitioner was working. Ochoa was the principal investigator under the grant and directly responsible to NIH and HEW. During pretrial examination, respondent, Ochoa, testified as follows:

> "Q. Now, under this grant that you were doing this research under, who was the principal investigator? A. I was.

> Q. Did that involve any duties with respect to the publication of information regarding research done under that grant? A. I think I am responsible as the principal investigator for all work that is published under the grant.
>
> Q. You are responsible to the granting agency? A. Yes."

In so acting, Ochoa and New York University, as Ochoa's employer and the grantee institution, became the representatives of the federal government. The authority which they exercised was the authority of the federal government itself. Accordingly, the Fifth Amendment required that respondents' action vis a vis petitioner be consonant with due process standards. *Monroe v. Pape*, 365 U.S. 167 (1961).

Respondents were granted authority by HEW to direct and administer the research project on which petitioner was working. In so acting, respondents became the agents of the government. Since the Department of Health, Education and Welfare is an executive department of the federal government and its actions must conform to due process standards, so too must the actions of its agents when exercising the authority of HEW. *Monroe v. Pape*, supra.

Moreover, respondents, in acting as federal representatives, were delimited in their actions by the policies and regulations of NIH and HEW.

The acceptance of the grant by the respondents bound them to rigid restrictions in the operation of the research work for which the grant was made. The Secretary of HEW carefully examines the proposed project through experts and consultants. Taken into account is the scientific merit and significance of the project and the competency of proposed staff (42 C.F.R. 52.13). Petitioner was included in all applications and renewal applications from September 1964 through the one of September 1969 to August 1970. (Petitioner was discharged by respondent Ochoa on September 3, 1969.)*

All amounts awarded under the grant remain subject to accountability (42 C.F.R. 52.14) and may be revoked at any time (42 C.F.R. 52.15). Inspection and audit by the Secretary may be made at any time and conduct interviews with principal staff members (42 C.F.R. 52.23(b)). Additional conditions may be imposed as may be "necessary to assure or protect advancement of the approved project, the interests of the public health, or the conservation of grant funds" (42 C.F.R. 52.24).

Title to equipment, materials or supplies purchased from grant funds shall be transferred to the United States upon termination of project (42 C.F.R. 52.42(d)). Interest earned on grant funds or investments must be paid to the United States (42 C.F.R. 52.43) as well as income from patents, inventions or discoveries (42 C.F.R. 52.44). In addition, careful supervision of the scientific content of

* The opinion in the Court of Appeals fails to mention this but leaves the incorrect impression that petitioner was discharged "two months later".

the government-subsidized research project was exercised even to the extent of visits to the site of the research by officials of NIH: "In the course of such site visits, Council members or consultants would talk to the principal investigator and such other persons on his staff as he might designate as well as administrative personnel at the grantee institution. Proposed budgets would also be reviewed to determine whether they were adequate for the proposal made in light of the experience and knowledge of Advisory Council members" (Affidavit of Thomas A. Fitzgerald, Assistant Comptroller and Director of Research and Training Program Management of New York University Medical Center, dated February 21, 1973, attached to moving papers of respondents).

Congress had specifically provided that recipients of "all or any part of any grant awarded by the Secretary or any other officer or employee of the Department of Health, Education and Welfare" make "[s]uch reports as the Secretary or other officer awarding the grant may find necessary to assure expenditure of funds for the purpose of and in accordance with the terms and conditions of the grant . . . " 31 U.S.C. Section 553. The monies from the HEW grant in question were paid directly to respondent, New York University, which in turn released funds to respondent, Ochoa. Respondent, Ochoa, as head of the Department of Biochemistry, employed these funds at his discretion in accordance with the research objectives stated in the terms of the grant.

Respondent, N.Y.U., the recipient of the HEW grant on behalf of the Department of Biochemistry and respondent, Ochoa, as the "principal investigator" under the grant, were therefore both directly responsible to NIH

and HEW. This accountability of respondents to an agency of the federal government is still another reason for holding respondents to the due process requirements of the Fifth Amendment.

A third method of discovering the "governmental" character of a "private" organization is the nature of the function it performs. If the "private" body is performing a "public function", one that is intended to benefit the public as a whole, it is to that entent exercising a "part of the sovereignty of the government", and its actions are delimited by the Constitution. *Boman v. Birmingham Transit Co.*, supra; *Terry v. Adams*, 326 U.S. 501 (1946); *Evans v. Newton*, supra.

The activities of the Department of Biochemistry of the Medical School at New York University, serve a "public" function in at least two significant respects. The first is the conduct of medical research designed to improve the health of the general citizenry. That the federal government has as one of its functions the improvement of medical diagnosis and treatment for Americans is clear from the very existence of NIH. One of the means developed by HEW and NIH to achieve this end is to make grants for medical research of the kind the Department of Biochemistry received. As a recipient of such a grant, the Department of Biochemistry was executing a function so clearly "public" in its nature as to bring it within the strictures of the Constitution.

The nature of the activities of the Department of Biochemistry are "public" in a second way recognized by the courts. As a department in the Medical School which is a division of a large institute of higher education, the

Department is fulfilling the important public task of education. "No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution . . . Clearly, the administrations of a private college are performing a public function." *Guillory v. Administrators of Tulane University*, 203 F. Supp. 855, 858-59 (E.D. La. 1962).

A case very much in point is *McQueen v. Drucker*, 438 F.2d 781 (1st Cir. 1971). In that case a private builder constructed and operated a housing project under Section 221(d)(3) of the National Housing Act, 12 U.S.C. Section 1715(d)(3). The supervision by the federal government in that case and in the one now before this Court are similar. The question before the Court in *McQueen* was "whether the landlord though not an ostensible agent of the state, has such a relationship with the state that his activities take on the color of state law" (782).

In *McQueen* the landlord sought to evict some tenants after they had complaints and a confrontation with the landlord. The tenants by this action sought an injunction. The Court took jurisdiction and found that when the landlord accepted a subsidization of his project by the government he had "been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches" (784, 785). The Court further held:

> "The court was well within its bounds to discount these grounds . . . and find the dominant and primary motive one of retaliation against the appellees for their exercise of First Amendment rights" (785).

The facts surrounding First Amendment rights in *McQueen* and this case bring them very close. Petitioner has consistently claimed that he was punished because he exercised his right to publish; the tenants in *McQueen* were being threatened with eviction because of complaints.

It must be concluded then "[b]y sifting facts and weighing circumstances," that the actions of respondent, New York University, and its employee, respondent, Ochoa, were so clothed with governmental authority and purpose that they must be considered as if they were the actions of the federal government itself. Viewed in this light, the behavior of respondents must be limited by the due process requirements of the Fifth Amendment, at least insofar as it relates to individuals in the Department of Biochemistry who conducted research under the Federal grant. And clearly, the summary dismissal of petitioner in no way conformed to the basic Fifth Amendment due process formula.

II.

By arbitrary dismissal, respondents denied petitioner due process of law.

Due process of law as guaranteed by the Fifth Amendment insures that no person may be deprived of life, liberty or property for arbitrary reasons; the very essence of due process is the "protection of the individual against arbitrary action" *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302 (1937); *Slochower v. Board of Education*, 350 U.S. 551, 555 (1956). Dismissal from employment for reasons which

have no rational connection with an individual's ability to perform the required work is an arbitrary action and hence contrary to due process, *Wieman v. Updegraff*, 344 U.S. 183 (1957); *Dent v. West Virginia*, 129 U.S. 114 (1888); *Slochower v. Board of Education*, supra.

There can be no question that the action of respondents in dismissing petitioner was precisely the type of arbitrary behavior against which the Fifth Amendment was designed to guard.

There were never any allegations that petitioner was incompetent or dilatory in performing his assigned duties. Indeed, the letter of dismissal from respondent, New York University, acknowledged "with appreciation" petitioner's "contribution to the research and teaching programs of the School of Medicine." In reality, petitioner was fired in retaliation for his failure to accede to respondent, Ochoa's, unreasonable and fraudulent demands. That petitioner should be deprived of his position which he competently and dutifully manned for over six years for refusing to help perpetrate a fraud on the academic medical community was arbitrary action in its most extreme sense.

In order to facilitate the Fifth Amendment protection against arbitrary government action of the type to which petitioner was subjected, the courts have developed basic procedural safeguards. "The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). He was deprived completely of any procedural recourse to challenge the determination to

fire him. The right to a prior hearing has been established by a general line of Supreme Court cases supporting that right before any substantial government benefit is terminated. See, for example, *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963); *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1927); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). In the instant case, petitioner was not even afforded a "minimum" of due process protection. He was given no prior opportunity to meet the charges against him and to confront witnesses before he was dismissed from the HEW supported research project. Even after he had been arbitrarily dismissed, petitioner, through his attorney, suggested several procedures for resolving the dispute amicably, without going to Court. But respondents declined to agree to any methods which would permit petitioner to answer respondents' reasons for dismissing him, to the extent that any rational reasons exist at all. Therefore, petitioner instituted the present action for punitive damages as the only satisfactory way of vindicating his constitutional rights and clearing his damaged professional reputation.

It should be clear from the foregoing analysis that respondents' actions, which were subject to due process requirements, failed to conform in the least to the basic guidelines which have been established by the Courts to secure due process rights. However, for there to have been a violation of petitioner's constitutional rights it must be demonstrated that he was deprived of interests encompassed within the Fifth Amendment's protection of liberty and property. Clearly, the range of interests protected by due process is not without limits, but in the present case, petitioner was most assuredly deprived of these basic rights.

In developing the concept of liberty as guaranteed by the Fifth and Fourteenth Amendments, this Court has not limited its regard for the concept to mere freedom from bodily restraint. Liberty has come to mean the right of the individual "to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In a constitution for a free people, the meaning of "liberty" must indeed be broad. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

By dismissing petitioner for his refusal to give respondent, Ochoa, credit for work performed by petitioner, respondents clearly sought to deprive petitioner of his own labor. (*The Antelope*, 10 Wheat 66). But more fundamentally, respondents' arbitrary interference with petitioner's personal employment constituted a "substantial impairment of liberty in the long established constitutional sense." *Coppage v. Kansas*, 236 U.S. 1, 14 (1915). Arbitrary action that prohibits a person from pursuing his chosen occupation "deprives him . . . of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which is a material part of the liberty of a citizen." *Butcher's Union Co. v. Crescent City Co.*, 111 U.S. 746, 765.

Petitioner's profession is extremely specialized and consequently positions in the field are highly coveted. In dismissing him in arbitrary fashion, respondents not only deprived petitioner of his liberty to pursue his vocation at New York University, but they also seriously impaired his freedom to obtain an equivalent position elsewhere. The

manner in which petitioner was fired generated substantial adverse publicity in academic circles and thereby impugned petitioner's personal and professional reputations. He was compelled finally to accept a position in Canada where the working conditions are less than ideal.

"Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Wieman v. Updegraff*, supra; *Joint Anti-Facist Refugee Committee v. McGrath*, supra; *United States v. Lovett*, 328 U.S. 303, 316-317 (1946). See *Cafeteria Workers v. McElroy*, 367 U.S. 886, 898 (1961). In compelling conformity to due process standards where an individual's reputation is in question, this Court has sought to provide that person with an opportunity to clear his name so that he will be free to pursue future opportunities unstigmatized. For "[t]o be deprived not only of present government employment but of future opportunity for it is no small injury . . . ." *Joint Anti-Facist Refugee Committee v. McGrath*, supra, at 185 (Jackson, J., concurring).

The arbitrary action of respondents also deprived petitioner of property rights secured by the Fifth Amendment. These protected property interests may take several forms. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (right to receive welfare benefits); *Fleming v. Nestor*, 363 U.S. 603, 611 (1960). *Slochower v. Board of Education*, supra, (right to continued employment of a tenured public college professor); *Wieman v. Updegraff*, supra, (right to employment of college professor and staff members

dismissed during the terms of their contracts); *Connell v. Higginbotham*, 403 U.S. 207 (1971), (right to employment of teacher, recently hired without tenure or a formal contract). The interest of petitioner in continuing his profession is "of great value . . . [and] cannot arbitrarily be taken . . . anymore than real property or personal property can thus be taken." *Dent v. West Virginia*, supra, at 121-122.

The fact that petitioner was non-tenured is not dispositive of the issue. "In the case of teachers whose contracts are not renewed, tenure is not the 'critical issue.'" *The Board of Regents v. Roth*, 408 U.S. 564, 582 (1972) (Douglas, J., dissenting). In a number of cases, the Supreme Court has protected the constitutional rights of persons who were without tenure or other guarantees of long-term employment. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Connell v. Higginbotham*, supra. In any case, although petitioner had no tenure, his long-time employment with respondent, New York University, and his considerable work on HEW funded research projects were sufficient to justify an expectation on his part of continued employment. After over six years of productive employment, neither he nor respondents could reasonably have viewed petitioner's position of research associate professor as a temporary or probationary post. A most recent case on this point is *Johnson v. Fraley*, 470 Fed.2d 179 (4th Cir. 1972).

In the light of the preceding analysis, the conclusion must be drawn that the arbitrary action of respondents deprived petitioner of his basic rights of liberty and property in contravention of the due process requirements of the Fifth Amendment.

III.

That there was no government action involved in the arbitrary dismissal of petitioner is without merit.

Neither this Court nor lower federal courts has formulated any "refined" test of what constitutes government action for the purposes of the Fifth and Fourteenth Amendments. To the contrary, the courts still consider each case on the basis of its own unique elements "sifting facts and weighing circumstances" so that "the non-obvious involvement of the state can be attributed its true significance". Indeed, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 173 (1972), Mr. Justice Rehnquist stated:

> " . . . We conclude that Moose Lodge's refusal to serve food and beverages to a guest by reasons of the fact that he was a Negro does not, *under the circumstances here presented*, violate the Fourteenth Amendment." (Emphasis added.)

This Court has left the term state or governmental action flexible and its contours unclear and it seems to have done so quite deliberately. For example, Justice Clark, commenting upon the Equal Protection Clause in *Burton v. Wilmington Parking Authority*, supra, 722 stated:

> "Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary

> if the right were to be enjoyed in the variety of individual state relationships which the Amendment was designed to embrace."

These cases are inapposite and are easily distinguishable on their "facts and circumstances" from the case at bar. *Mulvihill v. Julia L. Butterfield Hospital*, 329 F. Supp. 1020 (S.D.N.Y. 1970), raised the issue of whether doctors, who were summarily dismissed by the Board of Trustees, of a private hospital receiving Hill-Burton construction funds from the state, could premise their action on alleged violations of their due process rights arising under the Fourteenth Amendment. The district court quite rightly found no subject matter jurisdiction as the state funds were used only to finance building projects at the hospital and state regulation amounted solely to seeing that the funds were spent properly. The complaining doctors, in their duties at the hospital, had no direct connections with the construction projects, nor were they in any way subject to supervision by the State or representatives of the State. Petitioner, on the other hand, was intimately involved in the government-financed project at New York University. He conducted research under the NIH grants for six years and was overseen in his research and dismissed from work on the grant and from N.Y.U. by respondent, Ochoa, the man, who by respondent's own portrayal, is directly responsible to NIH and HEW for the scientific and technical direction of the project.

"As stated at page 2 of the Policy Statement, the principal investigator of a research grant project is . . . the individual designated by the grantee and approved by the Public Health Service who is responsible for the scientific

and technical direction of the project. The principal investigator prepares the grant application and, in particular, the statement of research objectives, procedures and plan of research since, in essence, it is that individual's scientific project which is being funded. The day-to-day scientific and technical supervision and direction of the grant project and the persons engaged in work thereon is provided by the principal investigator, with administrative oversight by the grantee. He is the individual directly responsible for determining and designating the staff, equipment and facilities needed to carry out the research. In particular, decisions with respect to the hiring and firing of personnel involved in project work rest solely with the principal investigator and grantee institution. These decisions are made in conformity with N.Y.U. policy, not NIH policy." (Affidavit of Thomas A. Fitzgerald, Assistant Comptroller and Director of Research and Training Program Management of New York University Medical Center, dated February 21, 1973, attached to moving papers of respondents.)

The case of *Browns v. Mitchell*, 409 F.2d 593 (10th Cir. 1969), is wide of the mark by an even greater margin. There the only state involvement which plaintiffs could show was the tax exempt status of the university whose actions were being challenged. Clearly, the nexus between the expelled students and the government involvement was even more tenuous than in *Mulvihill*, supra. Moreover, the court in *Browns* took care to point out that not only were students granted hearings, albeit subsequent to the initial decision to dismiss them, but they were also accorded extensive rights to appeal, which all of them exercised. While, in theory, the holding of hearings was unrelated to the jurisdictional issue, as a practical matter, the fact that

all of the complaining students had had opportunities to vindicate their rights surely militated against the court's finding jurisdiction for purposes of adjudicating claims of denial of due process. Petitioner, of course, was never granted a hearing nor were the reasons for his dismissal ever made known to him so that he might clear his unjustly blemished professional reputation.

The case of *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968), concerned the alleged arbitrary dismissal of seven students from Alfred University. Four of the students were enrolled at the Liberal Arts College and three at the New York State College Ceramics. The University, an otherwise private institution, operated and administered the ceramics college under a contract with the state which paid the expenses of the college. All seven students based their claim of state action primarily on this state funding and fiscal regulation of the ceramics college. With regard to the students at the Liberal Arts College, the Court found insufficient state involvement to activate the constitutional protections of the Fourteenth Amendment. It was otherwise with the students at the state-supported ceramics college where the Court discovered more than adequate state participation in the alleged wrongdoing to take jurisdiction of the action. The Court reached this conclusion, despite the fact that the cases of all seven students were factually identical and despite the fact that the parties who were responsible for the expulsion of the students and who were the named defendants in the action were the president of the private university and Alfred University itself. The dean of the ceramics college, all of whose salary was paid by the state, was not involved in the suit.

The relevance of *Powe* to the present action is apparent. N.Y.U., a private university, receives federal funds which fully finance a research project headed by respondent, Ochoa and on which petitioner has worked extensively. Respondents' status is similar to that of the defendants in *Powe*, who, in addition to their other admittedly private duties, were charged with the responsibility of administering an exclusively government-financed operation in their midst. The position of petitioner, by dint of his considerable work on the government project, is analogous to that of the students at the ceramics college. Moreover, petitioner's claim to constitutional protection from arbitrary governmental action is strengthened by the fact, that appellant's article, which is the central focus of the present action, grew out of his researches conducted under the NIH grant. Finally, the holding in *Powe*, vis a vis the ceramics college students, may be read as laying to rest respondents' suggestion that for petitioner to invoke the Fifth Amendment, his arbitrary dismissal would have had to have come at the hands of an official government employee or as a result of an explicit government order. *Powe* established that when institutions or individuals the majority of whose functions and duties may be private, are acting within a context which draws its financial sustenance from and is subject to regulation by the government, they become representatives of that government. Consequently their actions as government representatives are delimited by the constitution.

In *Moose Lodge No. 107 v. Irvis*, supra, as previously noted, as in all "state action" determinations, the unique fact set was the essential element in the Court's decision. Crucial among the relevant circumstances was the private

nature, both in a physical and social sense, of *Moose Lodge No. 107*. The lodge was a private club for members only, it received no public funds and its function was a wholly private one. Respondents on the other hand, receive substantial government aid which is designed to facilitate research, the results of which it is envisioned will improve the health of the general citizenry. Furthermore, the fact that the lodge had a state-granted liquor license, presumably paid for with private funds, was in no obvious way related to the private discrimination against the appellee because he was black. That is, partaking of liquor at the lodge was only one activity from which appellee was excluded because of his race. As in *Mulvihill*, supra, and *Browns*, supra, there was no showing that the complaining party would, in any specific way, have benefited from or was a participant in the activities which were made possible by the government support. By contrast, in *Siedenberg v. McSorley's Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969), where the sole purpose and only source of revenue of the defendants was the sale of alcoholic beverages to an exclusively male clientele, a state liquor license was found to be sufficient state action in a suit brought by women who had been denied service. Petitioner, to reiterate, performed substantial research on the government project, and the object of his dispute with respondents was an article based on the results of some of these researches.

The Court in *Moose Lodge*, supra, did rule in appellees' favor on one point. It was held that a state requirement that private clubs comply with their by-laws was sufficient action for purposes of the Fourteenth Amendment when one of the lodge's by-laws prohibited black guests. A

similar mode of analysis was employed in *Coleman v. Wagner College*, 429 F.2d 1120, 1124 (2d Cir. 1970), where the Court held that state authorization for private conduct, violative of due process rights, would be constitutionally proscribed.

In *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (1973), where the plaintiffs sought to establish jurisdiction are far remote from those in this case. In *Grafton*, the plaintiffs contended they were denied constitutional rights to free speech and representation by counsel guaranteed by the First and Sixth Amendments made applicable to the state by the Fourteenth and deprived them of liberty and property without due process of law in violation of the Fourteenth Amendment.

The Court in *Grafton* found in substance that the regulations of the state regarding law schools and law students are not sufficient to constitute such state action to bring the Brooklyn Law School within such control of the state to protect the constitutional rights claimed by the students. However, even in that case, as distinguished from the case now before this Court, the students were granted hearings.

The evident distinction between *Grafton* which was not state supported and this case is that the Biochemistry Department of respondent, University was solely supported by the federal government. Its very life depended upon such federal grant and with it petitioner's job. The complete and thorough control by the federal government is developed earlier in this petition.

It is the very authority possessed by Ochoa, and acquiesced in by N.Y.U., which requires that their actions conform to due process standards. By the reasoning in *Moose Lodge* and *Coleman* the vesting in respondent by the federal government of the power to administer research, financed entirely with public funds and designed to further general public health goals, is sufficient government action to bring the Fifth Amendment into play.

Respondents stress that Ochoa is completely responsible for the scientific and technical direction of the NIH supported project (Affidavit of Thomas A. Fitzgerald, p. 66 para. 24). Respondents also claim that the reason petitioner was dismissed from work on the project was because he neglected to permit Ochoa to inspect the manuscript before submitting it for publication. Furthermore, respondents allege that petitioner's manuscript was deficient in certain substantive respects, and, therefore, "as principal investigator under the aforementioned grant, respondent, Ochoa took action he deemed appropriate to withhold publication of said manuscript." When petitioner refused to abide by Ochoa's unreasonable actions and demands, respondents admit that Ochoa "refused to allow him [petitioner] to work on a grant for which respondent Ochoa was responsible . . . ". In so linking the dismissal of petitioner with Ochoa's duties and responsibilities as the principal investigator on the grant, respondents themselves have demonstrated the requisite amount of government involvement necessary to bring their actions within constitutional boundaries. The fact that the government command was no more specific than that Ochoa assume full responsibility for all activities on the project, does not undermine this argument. What could

be a more general and superficially innocuous government command than that private clubs faithfully adhere to internal rules of their own making? Respondents miss the point in talking about Ochoa's absolute discretion in personnel matters. The cogent consideration is that this discretionary responsibility was conferred on Ochoa by the federal government, and accepted by him and N.Y.U., as a necessary condition to the granting of government funds to them. By purportedly meeting these responsibilities by arbitrarily dismissing petitioner, Ochoa was exercising the power and authority of the government.

Final note should be taken of respondents' arguments that the research conducted under the grant is "pure" and a private undertaking. In the first place, characterization of research as "pure", as opposed to "applied", will not strip it of its public character and function when it is supported by public funds and designed ultimately to benefit the general public. Indeed, the NIH Policy Statement in speaking of the relationship between the grantee and grantor of research funds, states:

> "This relationship results from the basic nature of the grant as a conditional gift in response to a request for support of a project in which there is *a substantial measure of public interest*" (emphasis added).

In fact, it is highly probable that in the absence of government support, a good deal of research presently being conducted in American universities would not be possible. Surely if scientific research and other activities of considerable social utility would not exist but for government support, then these activities are "public" in

the most fundamental sense. Respondents cannot have it both ways. Either they shun public monies and remain wholly private and free to act as they please, or they accept federal funds and with them the obligation to modify their behavior to conform to constitutional standards.

IV.

Respondents' arbitrary dismissal of petitioner constituted punishment for his exercise of rights secured by the First Amendment.

Petitioner was discharged from work on the federally-supported research project solely because he refused to recall his manuscript or to list respondent Ochoa's name on the manuscript. In so penalizing petitioner for the exercise of his right to freedom of academic expression, respondents contravened the requirements of the First Amendment of the Constitution. It is difficult to conceive of a more blatant attack on academic freedom than for university authorities to be permitted to discharge a teacher-researcher for his refusal to withdraw from publication the results of his own research or to give credit for his work to someone who does not deserve it. The Supreme Court has repeatedly affirmed its abiding concern for the preservation of academic freedom:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers

> concerned. That freedom is therefore a special concern of the First Amendment . . ." *Keyishian v. Board of Regents*, 385 U.S. 589 at 603 (1967).

The connection between alleged violations of First Amendment rights and due process guarantees is manifest. When wrongs of these types are claimed by a discharged employee, the alleged reasons for nonrenewal or dismissal should be scrutinized to ascertain whether the reasons are merely masking a violation of activities or attitudes which are guaranteed by the Constitution or other statutes. See, for example, *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964), where the Court overturned the dismissal of an employee who had actually been fired for his statutorily-protected participation in union activities, but whose discharge was premised on "acceptable" grounds.

It is immaterial that petitioner was not protected from arbitrary and capricious dismissal by a tenured status. In *Keyishian v. Board of Regents*, supra, one of the petitioners had only a one-year contract. The teacher, whose First Amendment rights were protected in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), had no tenure, but was only a guest lecturer, and in *Shelton v. Tucker*, 364 U.S. 479 (1960), the positions of petitioners were all terminable after one year. Moreover, any claims by respondents that petitioner's teaching and research positions are privileges which respondents can withhold or grant on conditions, must fail. This Court has conclusively established that the granting of certain privileges or opportunities may not be conditioned on a surrender of the right to freedom of expression. *American Communications Assn. v. Douds*, 339 U.S. 382 (1949),

(privilege to invoke the facilities of the National Labor Relations Board); *Hannegan v. Esquire, Inc.*, 327 U.S. 146 (1945), (mailing privileges); *Wieman v. Updegraff*, supra, (opportunity for public employment); *Speiser v. Randall*, 357 U.S. 513 (1958), (tax exemption privilege).

This Court has conceded that in many cases there is likely to be a conflict between First Amendment guarantees and the need for orderly administration. *Pickering v. Board of Education*, 391 U.S. 563. Indeed, respondents contend that one of the reasons petitioner was dismissed from work on the grant was that he violated "a long-standing written policy . . . requiring advance approval by Ochoa of all manuscripts submitted for publication by members of his department." This conflict then between petitioner's academic freedom and the purported policy of prior approval by Ochoa makes the present case entirely unsuitable for summary judgment. Careful fact-finding is essential to know whether the given reason for petitioner's dismissal is the real reason or, as petitioner contends, merely a subterfuge to cover an abridgement of his protected academic freedom. And when the government, or those acting as its representatives, proposes to deny a privilege to one who it alleges has engaged in unprotected speech, due process requires that the government assume the burden of proving that the speech was not protected. *Speiser v. Randall*, supra. Respondents have never undertaken this burden and must, therefore, meet their responsibilities at a trial on the merits.

In sum, petitioner submits that his dismissal and the nonrenewal of his contract implicated the First Amendment. As a consequence, he was deprived of his

constitutional rights because his employment on the NIH grant was conditioned on a surrender of First Amendment rights. In addition, he was denied due process. In the absence of an opportunity to confront the charges against him and rebut them, there are no means other than a lawsuit such as the present action for petitioner to safeguard his right not to be discharged for the exercise of First Amendment guarantees.

V.

Violations of rights secured by the Fifth Amendment may be made the basis of a claim for damages.

The Courts have recognized the private right to sue for damages caused by an alleged violation of any provision of the Constitution of the United States. This Court has long recognized the existence of a private damages action premised solely on a violation of Fifth Amendment rights. In *Jacobs v. United States*, 290 U.S. 13 (1933), the plaintiffs sought compensation for the taking of their land by flooding that resulted from the construction of a federal dam. This Court allowed the recovery of the value of the land at the time of the taking, plus interest thereafter. The action was brought under the Tucker Act, which gave the district courts jurisdiction over claims against the United States "not exceeding $10,000 founded upon the Constitution" 28 U.S.C. Section 41(20). That act, however, merely conferred jurisdiction and did not, in itself, create any rights or remedies. The Court emphasized that the right to recover rested squarely on the Fifth Amendment's prohibition against the taking of private property for public use without compensation:

> "It [the claim] rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. The suits were thus founded upon the Constitution of the United States." 290 U.S. at 16.

Thus the recovery of the interest could not be defeated on the ground that it was not authorized by statute as long as such recovery was appropriate to the vindication of the constitutional right to receive just compensation.

The decision in *Jacobs* is not a jurisprudential anomaly; the Fifth Amendment's prohibition against the taking of land by the federal government without paying just compensation, therefore, has been consistently utilized as the source of offensively-oriented private rights of action. In fact, the existence of this private right of action, based on the Constitution, substantially predates *Jacobs*. In *United States v. Lee*, 106 U.S. 196 (1882), the Supreme Court permitted the respondents to recover possession of land seized by the federal government. There too, the sole basis of the action was claimed violation of rights secured by the Fifth Amendment.

Furthermore, a careful analysis of the majority and concurring opinions in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), demonstrates that a private cause of action for damages may be maintained under the Due Process Clause of the Fifth Amendment as well as under the Just Compensation Clause.

The government, in *Bivens*, argued that the Court, in the absence of specific congressional authorization, had no power to award the petitioner damages for the alleged violation of his Fourth Amendment rights. The Court concluded otherwise, reasoning that its power under a general grant of jurisdiction (such as that conferred by 28 U.S.C. Section 1331) extended to affording whatever form of relief might be deemed appropriate in any particular case. The majority noted its decision in *Bell v. Hood*, 327 U.S. 678 (1946), where the plaintiff had alleged violations of both Fourth and Fifth Amendment rights:

> "Of course, the Fourth Amendment does not, in so many words, provide for its enforcement by an award of money damages for the consequences of its violation. But 'it is . . . well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.' *Bell v. Hood*, 327 U.S. at 684." 403 U.S. at 396.

Thus, in the view of the *Bivens* majority, the power to afford a remedy is an inherent part of the judicial function. In the federal courts this power is conditioned on only two prerequisites: (1) the invasion of a federal right (in non-diversity cases); and (2) the existence of a federal statute giving the courts jurisdiction over cases revolving around that right.

Application of the *Bivens* rationale to the case at bar is revealing. Petitioner alleges that his federal right to due process was denied him by respondents' action in dismissing him without a prior hearing, without adequate

notice or specification of charges, without the presentation of evidence and without giving him the opportunity to present evidence in his own behalf or to cross-examine witnesses against him. Assuming a finding by this Court of government involvement, petitioner has met the second prerequisite in that 28 U.S.C. Section 1331, grants district courts "original jurisdiction of all civil matters wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution . . . ." See also *Bell v. Hood*, supra. This Court, then has latitude to fashion any suitable remedy should petitioner prevail on the merits.

The fact that a single district court has expressed some trepidation at extending the *Bivens* holding to actions under the Fifth Amendment, *Davidson v. Kane*, 337 F. Supp. 922 (E.D.Va. 1972), should not be interpreted as supporting respondents' claims. Rather, that court's timidity is an indication that it, like respondents, has misread *Bivens*, or at least ignored the fundamental import of the opinion.

Perhaps the most remarkable and telling aspect of *Bivens* was Mr. Justice Harlan's concurring opinion. Long recognized as the leading opponent of "judicial legislating," Justice Harlan had absolutely no qualms about affording a damage remedy without explicit congressional authorization in appropriate cases:

> "[I]t would be anomalous to conclude that the federal judiciary — while competent to choose among the range of traditional judicial

> remedies to implement statutory and common law policies, and even to generate substantive rules governing primary behavior in furtherance of broadly formulated policies articulated by statute or constitution — is powerless to accord damages to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the government as an instrument of the popular will." 403 U.S. at 403-04 (citations omitted).

Justice Harlan pointed out that federal equitable relief has traditionally been available when constitutional rights were threatened, so that the mere status of the right as constitutional does not render the courts powerless in the absence of congressional authorization. That is, if the general grant of federal question jurisdiction can support equitable relief, it is also sufficient to empower the federal courts to grant a traditional remedy at law.

Relief sought against federal officers for violations of due process has traditionally been equitable in nature, generally injunctions preventing wrongful discharge on orders requiring fair hearings. However, injunctive relief would, at this juncture, be inadequate for petitioner therefore he must be permitted to maintain an action solely for damages as was allowed in *Bivens*.

Initially, petitioner and his attorney requested that respondents give him a hearing or at least specify the charges against him so that he could rebut them and clear his good name. However, respondent, N.Y.U., consistently refused to accord petitioner even a modicum of the fair

treatment required by due process. Eventually petitioner was compelled to abandon any hope of being reinstated at N.Y.U. and work on the grant, and after considerable difficulty, stemming from the wrongful, intentional and malicious conduct of respondents he obtained a teaching position outside the United States, at an isolated location where his working conditions are relatively inferior. Petitioner believes that any hearing respondents might now be compelled to accord him would most assuredly lack the constitutionally requisite fairness and impartiality and would serve merely to "rubber stamp" the original arbitrary decision to dismiss him. Moreover, even assuming that this Court were, in some way, to insure that petitioner was given fair treatment and a decision to reinstate petitioner was taken, the irreconcilable personal bitterness and animosity engendered by respondent's actions combined with the fact that petitioner and his family have permanently relocated at the site of his new job, would render it infeasible, in any practical sense, for petitioner to return to the employ of N.Y.U. under Ochoa's supervision. Punitive damages is the only form of relief by which petitioner may, at this time, vindicate his constitutional rights.

The argument put forward by the government in *Bivens* was explicitly rejected by this Court. The court held that federal courts in the absence of statutory authority, should exercise their inherent power to afford a traditional remedy at the behest of a litigant, only when the failure to do so would render the constitutional provision, a mere abstract pronouncement. Both the majority and Justice Harlan felt that the argument for a stricter standard for constitutionally-implied remedies could not prevail:

> "[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes." 403 U.S. at 407 (Harlan concurring).

Clearly then for federal courts to grant legal remedies in cases of constitutional transgressions, it does not require that the constitutional provision in question be in danger of becoming meaningless. Courts may shape the relief to meet the demands of justice in each particular case. In any event, even if this court were to apply an "essentiality" test, as proposed by respondents, petitioner must still prevail. As demonstrated above, traditional equitable relief would be neither appropriate nor adequate in the present case. Yet, as petitioner has argued, respondents have substantially and injuriously abridged his constitutional rights. Therefore, petitioner must be permitted to press his action for punitive damages as the only way to redress the wrong done him and to demonstrate to the scientific community that his dismissal was unwarranted and in no way related to his competence as a scientist.

VI.

Respondents are not immune from suit.

Respondents cannot effectively argue that as agents of the federal government they are immune from suit. To this effect, they would try to rely on the decision of the Second Circuit in *Bivens* on remand from the Supreme

Court, *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2nd Cir. 1972). In that case the lower court held that the defendants were *not* immune from suit. An analysis of the Second Circuit's opinion, will show that the respondents like the narcotics agents are most assuredly personally liable for their actions.

The lower court had little difficulty in finding that the agents were acting "within the outer perimeter of [their] line of duty." Likewise, petitioner does not contest that respondents were acting within the "outer perimeter" of their duties pursuant to the authority vested in them by the federal government. However, the Second Circuit determined that the defendants, in acting in an allegedly unconstitutional matter, were not performing such discretionary acts as would entitle them to immunity from suit. In a similar vein, respondents by infringing petitioner's constitutional rights, became ineligible for any immunity which might have been derived from the performance of discretionary functions.

Moreover, petitioner submits that an unconstitutional act can never be within the scope of official duty. Such action, no matter how strongly related to the government representative's immediate responsibilities, is clearly inconsistent with the totality of duties imposed on him by federal law, and the doctrine of official immunity should not apply. Indeed, in *Hughes v. Johnson*, 305 F.2d 67, 70 (9th Cir. 1962), it was held that a violation of Fourth Amendment rights could never be said to fall within the scope of official duties, and accordingly, immunity does not extend to such conduct. The argument was stated most cogently by Judge Gewin in a blistering dissent in

Norton v. McShane, 332 F.2d 855, 866 (5th Cir. 1964). In that case, the majority sidestepped the issue of whether officials, charged with violations of the Fourth and Fifth Amendments, were immune from suit by treating plaintiff's allegations as simple tort claims. Judge Gewin countered strongly:

> "[N]o officer can *unlawfully*, *willfully*, *maliciously*, and *without probable cause*— all as alleged in the complaint — deny a citizen his *constitutional rights* and then claim that the acts involved '. . . have more or less connection with the general matters committed by law to the officer's control . . . .' It is a paradox to say that an unlawful, willful and malicious violation of the United States Constitution has ever . . .been 'committed by law' to the control or supervision of any officer, regardless of his rank or station in the government."

Moreover, there was another strain to the opinion of the Second Circuit in *Bivens*, supra. That is, the court realized the anomalous situation which would be created if federal law enforcement officers were entitled to immunity for constitutional violations for which state police would be personally liable under a federal statute, 42 U.S.C. Section 1983; 456 F.2d supra at 1446. Likewise, should this court rule that respondents are immune from suit, it would be creating an incongruous state of affairs. In those cases where the courts in the Second Circuit have found sufficient state or governmental action for jurisdictional purposes, suits by aggrieved students for damages and other relief have been maintained against

university officials under 42 U.S.C. Section 1983. See *Powe v. Miles*, supra; *Coleman v. Wagner College*, supra. To confer immunity on respondents in this action solely because the aid they receive and the authority they exercise emanates from the federal government would be to artificially bar from federal courts a subset of aggrieved parties seeking to vindicate constitutional rights which had been infringed by government action.

CONCLUSION

Contrary to the opinion of the Court of Appeals (Friendly, J.) there are many scientific projects funded by the government where the principal investigator is not a Nobel Prize winner. The grant to respondents was dependent not upon Ochoa, who alone would not have gotten the grant, but upon the stature and competence of the participants of which petitioner was one. (42 C.F.R. 52.13.)

The opinion confers omnipotence upon Ochoa. It placed him beyond the reach of the law in the conduct of his affairs and excused him for not having taken the time to appear before a court or even a university board to "justify" his decision. This is an incomprehensible unique conception and inimical to our legal system. Ochoa was never granted immunity from wrong. The opposite would be more in keeping with the obligation of Ochoa to recognize that under our system of government he cannot deny one his legal rights without being made accountable therefore.

The Court of Appeals virtually "repealed" the First and Fifth Amendments in its opinion. In contrast to the rights of tenants in a federally financed housing project to constitutional rights (*McQueen v. Drucker*, supra) with this federally financed research program, the court would not load the latter "with the full panoply of First and Fifth Amendment due process rights."

The Court of Appeals found that an issue of fact was present (footnote 8) in this case. This is another reason why this case was not ripe for summary judgment.

Finally, the Court of Appeals left the question of damages an "open" one (last words of opinion). This uncertainty of the lower court would appear sufficient for this Court to summarily grant this petition for certiorari.

For all of the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Stanley Faulkner

FAULKNER & SCHMIDT
Attorneys for Petitioner

APPENDIX A - DECISION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 353—September Term, 1973.

(Argued January 16, 1974 Decided February 11, 1974.)

Docket No. 73-2143

ALBERT J. WAHBA,

Plaintiff-Appellant,

v.

NEW YORK UNIVERSITY and SEVERO OCHOA,

Defendants-Appellees.

Before:

MOORE, FRIENDLY and ANDERSON,

Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Whitman Knapp, *Judge,* granting defendants' motion for summary judgment, for lack of requisite government action, in a suit by a research associate professor whom defendants removed from research work on a project funded by a federal grant.

Affirmed.

STANLEY FAULKNER, Esq., New York, N. Y. (Faulkner & Schmidt, New York, N. Y., of counsel), *for Appellant.*

Decision

GEORGE I. HARRIS, Esq., New York, N. Y. (Burke & Burke and Thomas C. Crane, Esq., New York, N. Y. of counsel), *for Appellees.*

FRIENDLY, *Circuit Judge:*

This appeal presents another variation on the pervasive theme of what constitutes government action. The complaint, filed in the District Court for the Southern District of New York, alleged the following: Plaintiff was a research associate professor in the Biochemistry Department of the New York University School of Medicine. Defendant Ochoa was chairman of the Department. Beginning in 1957, the New York University Medical Center received a series of annually renewed grants from the National Institute of Health (NIH), a component of the United States Department of Health, Education, and Welfare, for a program of basic research on Enzymic Mechanisms in Biosynthesis. The initial grant application designated Dr. Ochoa as "Principal Investigator;" Dr. Wahba was later listed as a participant. In January 1969 Dr. Wahba was invited to discuss the work he had been doing at a June symposium sponsored by the Cold Spring Harbor Laboratory of Quantitative Biology. Dr Wahba accepted the invitation and subsequently agreed to submit a related manuscript for publication in the laboratory's journal. In September, the complaint alleged, Dr. Ochoa rebuked plaintiff for having sent the manuscript without clearance and without including Dr. Ochoa's name. He demanded that Dr. Wahba write that experiments performed after submission of the manuscript made it desirable to withhold publication. Deeming this to be untrue, plaintiff refused to sign. Dr. Ochoa then removed Dr. Wahba from work on the research project and demanded that Cold Spring Harbor Laboratory cancel pub-

lication of the manuscript. About two months later, plaintiff was advised that his contract as a research associate professor would not be renewed upon its expiration on August 31, 1970. Prior to that time, Dr. Wahba obtained other employment at a medical school in Montreal. Apparently having suffered no economic loss, plaintiff requested punitive damages of $250,000 for harm to his reputation and emotional suffering.

In their answer, defendants attributed Dr. Ochoa's refusal to allow publication of the manuscript to the well-recognized scientific practice that papers emanating from group research shall not be published without the advance approval of the principal investigator. They added that Dr. Wahba's manuscript contained assertions that were at variance with findings of other investigators in the Department of Biochemistry which were then being prepared for publication. They also noted that despite Dr. Ochoa's protests, Dr. Wahba's manuscript was published. Alleging that it had continued to pay plaintiff's salary through February 1970, although he had been paid by the Sherbrooke University School of Medicine since January 2, defendant New York University counterclaimed for the two months' pay.

On the basis of affidavits of an attorney and two University officials,[1] accompanied by copious exhibits, defendants moved for dismissal of the complaint or summary

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1 The University officials who submitted affidavits were Thomas A. Fitzgerald, Assistant Comptroller and Director of Research and Training Program Management at the Medical Center, and Miguel de Capriles, the Vice President and Secretary of the University. The latter set forth that while New York University has a tenure system, Dr. Wahba's appointment was probationary and without tenure implications. It recited a by-law whereby research professors, research associate professors, and research assistant professors are considered to have non-tenure positions which "shall be for a definite period of time, not exceeding one academic year unless otherwise specified, and [which] shall automatically terminate at the close of that period unless there is an offered notice of renewal."

judgment in their favor on the basis that their conduct did not constitute government action. Judge Knapp granted the motion for summary judgment in defendants' favor; he later issued the appropriate certificate under F.R.Civ.P. 54(b), noting that the pendency of the counterclaim afforded no just reason for delaying the entry of judgment. Plaintiff has appealed.

It is not clear from his complaint whether plaintiff seeks recovery for his dismissal from the research project, or for the University's failure to renew his one-year contract without according him a due process hearing, or for both. As a non-tenured faculty member, in order to sustain his claim that he was dismissed without the requisite procedural protections, he would have to show some deprivation of liberty or property under the criteria established in *Board of Regents* v. *Roth*, 408 U.S. 465 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593 (1972).[2] Beyond this, however, Dr. Wahba appears to claim that he was denied First Amendment rights by virtue of Dr. Ochoa's demand that he withdraw his paper, and that he was denied due process by being severed from the research program without a hearing. We find it unnecessary to differentiate among the various possible claims raised in the complaint, since we are unable to discern the government action necessary to sustain any of them.

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2 In order to demonstrate a deprivation of liberty, Dr. Wahba would have to prove that the reasons given for the denial of his re-employment would "seriously damage his standing and associations in the community," or impose upon him "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities," *Roth*, 408 U.S. at 573. To prove a deprivation of property, he would have to prove not just "a unilateral expectation" of continued employment, but "a legitimate claim of entitlement to it," by showing, for example, that the University's yearly contract renewal system amounted to "a *de facto* tenure program." *Sinderman*, 408 U.S. at 600. See *Russell* v. *Hodges*, 470 F.2d 212, 216-17 (2 Cir. 1972); *Simard* v. *Board of Education*, 473 F.2d 988, 992 (2 Cir. 1973).

Plaintiff characterizes his situation as analogous to that of the students at the New York State College of Ceramics at Alfred University, discussed in *Powe* v. *Miles*, 407 F.2d 73 (2 Cir. 1968). As to the Ceramics College students, we found state action in the administration of discipline even though this was done by the President and Dean of Students of Alfred, who were not state officials, and the acts of the students were committed outside the Ceramics College. The distance separating this case from that of the New York State Ceramics College is sufficiently shown by quoting the most pertinent portion of our opinion, 407 F.2d at 82-83:

> We hold that regulation of demonstrations by and discipline of the students in the New York State College of Ceramics at Alfred University by the President and the Dean of Students constitutes state action, for the seemingly simple but entirely sufficient reason that the State has willed it that way. The very name of the college identifies it as a state institution. In part I of this opinion we have extensively reviewed the statutes making the college an integral part of the State University; it suffices here to cite Education Law § 6102, whereby Alfred University maintains discipline and determines educational policies with respect to the State College "as the representative of the state university trustees." We see no reason why the State should not be taken at its word. The statutory provisions are not mere verbiage; they reflect the Legislature's belief that the citizens of New York would demand retention of State control over an educational institution wholly supported by State money. If the discipline had been administered by the Dean of CC, all of whose salary is paid by the State, because of acts of CC students in the State-owned build-

ings, the existence of state action would hardly be doubted. We do not think a different result is justified because here the CC students were demonstrating on another part of the campus, which the State's payments on their behalf entitled them to enter for proper purposes, and the authority was exercised by delegates of the State who also have other roles. While even as to the CC students the President and the Dean of Students may lack the symbolic tie with the state furnished by the deputy sheriff's badge in Griffin v. Maryland, supra, or the public building in Burton v. Wilmington Parking Authority, supra, the students of the New York State College of Ceramics can properly regard themselves as receiving a public education[8] and entitled to be treated by those in charge in the same way as their counterparts in other portions of the State University. If the State wanted Alfred's policy on demonstrations changed for the CC students, mere order of the State University trustees would suffice, Education Law § 355(1) (a), and (2) (b); no general legislation would be needed, as it would be if the State desired to control the policy for other students. However one characterizes Alfred's relationship to the State with respect to the New York State College of Ceramics, it is much closer than that of an independent contractor. The State furnishes the land, buildings and equipment; it meets and evidently expects to continue to meet the entire budget; it requires that all receipts be credited against that budget, Education Law § 6102; and in the last analysis it can tell Alfred not simply what to do but how to do it.

This, however, does not end the case. Plaintiff claims that the relationship established by the research grant

sufficiently involves the United States to carry the First Amendment and the due process clause of th. Fifth over to New York University's dealings with him.

The application for the initial grant stated the names, so far as available, and included biographical sketches of all the personnel whose salaries were to be funded; Dr. Wahba's name was not listed. The grant included the salaries, certain other itemized expenses, and 20% of the total for indirect costs. Dr. Wahba's name first appeared in answer to a request for the names and title of "all other professional personnel engaged in the project" in an application for continued support through August 31, 1964; he was not, however, among those whose salaries were to be reimbursed. The same pattern continued thereafter. Papers co-authored by Dr. Wahba were mentioned in several of the applications. The research was thus a project of the Biochemistry Department of the New York University School of Medicine carried on with the collaboration of a number of University-paid personnel and on University facilities. The University received no federal payment for the services of the personnel or the use of the facilities except insofar as these were covered by the 20% allowance for incidental costs.

Plaintiff cites a Policy Statement of the Department of Health, Education, and Welfare, revised July 1, 1967. This clearly informs grantees that

> Public Health Service grants and awards must be administered in conformance with the Civil Rights Act of 1964; the regulation (45 CFR, Part 80) issued pursuant thereto by the Department of Health, Education, and Welfare; and the grantee's Assurance of Compliance (Form HEW-441), on file with the Public Health Service.

Decision

Plaintiff makes no contention that the defendants have violated Title VI of the 1964 Civil Rights Act, which provides, 42 U.S.C. § 2000d, that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Instead, he relies on general language in the Policy Statement which we set forth in the margin.[3] This, says the plaintiff, is clear evidence that the Federal Government regards itself as "a partner or . . . a joint venturer" in the research project, see *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 177 (1972).

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3 This Policy Statement should be used by grantee institutions as the source of the basic policy requirements under which Public Health Service research grants are administered. Under the terms of a research grant, the institution and the principal investigator enter into a special relationship with the Public Health Service for the utilization of grant funds. This relationship results from the basic nature of the grant as a conditional gift in response to a request for support of a project in which there is a substantial measure of public interest.

A grant, therefore, represents a mutual joining of interests on the part of the grantor and the grantee institution in the pursuit of a common objective. In this relationship, the grantee institution assumes with the grantor the obligation to act in the public interest in achieving a common purpose. This is a relationship of trust which imposes upon the grantee institution the responsibility to assure that the grant funds are utilized for the purpose for which they were awarded, and to exercise the same probity and prudence in their expenditure that is extended to the use of the grantee institution's own funds.

It is to these broad obligations that a recipient of a Public Health Service grant is accountable. This Policy Statement does not attempt to specify the full extent of the considerations which should bear upon a grantee institution in the use of grant funds. The Public Health Service is concerned with assessing the adequacy of administrative practices and the prudence exercised by the grantee institution to assure conformity with the terms of this Policy Statement.

Examination of the administrative processes utilized in the expenditure of grant funds is a continuing responsibility of the Public Health Service in the administration of these programs.

Decision

As indicated in *Powe* v. *Miles*, supra, 407 F.2d at 82-83, and *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1141-43 (2 Cir. 1973), we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees. In any event there was here no partnership or joint venture in the ordinary meaning of those words. As against the language of the Policy Statement on which plaintiff relies, another paragraph states:

> Administration of a grant-supported research project is a joint undertaking by the grantee and the principal investigator. The grantee assumes responsibility for fiscal and administrative management and fulfillment of any special conditions which may be prescribed for the conduct of the research. The principal investigator and the grantee institution share responsibility for the conduct of the research and for using grant funds prudently for the purposes set forth in the application and Notice of Grant Awarded.

The venture was to be that of New York University and Dr. Ochoa, undertaken with government support. What NIH wanted least was to share responsibility for its administration.

The Court in *Moose Lodge* could not have meant the reference to partners or joint venturers to be satisfied with some commonalty of economic interests *simpliciter*, since as a comment has pointed out, *The Supreme Court 1971 Term*, 86 Harv. L. Rev. 1, 73-74 (1972), such interests existed in a substantial degree in that case itself. The lodge received from the state permission to operate a lucrative business and obtained a valuable property right

in the liquor license itself; the state, operating a monopoly system, was provided with a distributor that produced substantial revenue. Reconciliation of *Moose Lodge* with *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), where the reciprocity of economic interests was not measurably greater, must rest on the difference between a private club and a restaurant in a public building. However offensive the exclusion of blacks from a social club holding one of a restricted number of state liquor licenses, the Court thought it significantly less than their exclusion from a restaurant in a building owned and operated by a public authority and whose construction and maintenance were paid by public funds. As Mr. Justice Clark so eloquently said in *Burton*, 365 U.S. at 724-25,

> It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings.

Plaintiff likewise derives little benefit from two leading and oft-cited cases relating to government grants, *Kerr* v. *Enoch Pratt Free Library*, 149 F.2d 212 (4 Cir.), *cert. denied*, 326 U.S. 721 (1945), and *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4 Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964). Apart from the point that both involved racial discrimination, the relative amount of public support in *Pratt* had become so great that in practical effect the city had simply chosen to allow private trustees to operate a public agency, and in

Moses H. Cone the federal government had involved North Carolina in administering the clearly unconstitutional "separate but equal" provision of the Hill-Burton Act, 60 Stat. 1041, 1043 (1946). Pointing in defendants' favor but not truly decisive are *Grossner* v. *Trustees of Columbia University,* 287 F. Supp. 535 (S.D.N.Y. 1968), and our own decision in *Grafton* v. *Brooklyn Law School,* supra, 478 F.2d 1137. In *Grossner,* Judge Frankel refused to find state action, in the context of student discipline, despite Columbia's receipt of over 40% of its total revenues from the federal government, together, of course, with the benefits of federal, state and local tax exemption. Similarly, in *Grafton* we rejected the plaintiff's contention, in the context of First Amendment and due process claims, that the conduct of the law school officials constituted state action because of a combination of the school's tax exemption, the sale of a site by New York City at a price so low that the school ultimately paid nothing for the portion of the land on which it was built, a $400 payment by the State for each degree awarded, and State regulations setting criteria for the law school curriculum that would qualify an applicant to take the state bar examination. We are left therefore with the task of "sifting facts and weighing circumstances" imposed by Mr. Justice Clark's opinion in *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 722, a procedure which, despite contemporary criticism of the opinion for failure to afford sufficient guidance,[4] has survived much better than attempts at more definitive formulations.

As the writer has suggested elsewhere,[5] determination of government action in such cases as this hinges on the

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4 See Lewis, *Burton* v. *Wilmington Parking Authority*—A Case Without Precedent, 61 Colum. L. Rev. 1458 (1961).

5 The Dartmouth College Case and the Public-Private Penumbra (University of Texas at Austin, 1969).

weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct, and the value of preserving a private sector free from the constitutional requirements applicable to government institutions. Here, while NIH funded the salaries of personnel engaged full-time in the project, one of the very reasons for its having this research conducted by the New York University School of Medicine, rather than performing the work itself, was to enlist the participation of other members of the Department of Biochemistry, notably the principal investigator, Dr. Ochoa, a scientist of international renown who had won the Nobel Prize in Physiology and Medicine in 1959. The Policy Statement makes the principal investigator "responsible for the scientific and technical direction of the project"; if he should cease to serve in that capacity, the grant is ended unless the grantee chooses to nominate a successor satisfactory to NIH. The form and manner of publication of results are left entirely in private hands.

This kind of arrangement, whereby federal funds are used to prime the pump of research effort in private scientific institutions which the Government could not perform as well, has social values too obvious to require elaboration. Only rarely are professors of Dr. Ochoa's eminence willing to enter government service in peacetime. It is equally clear that scientists of his reputation on the staffs of private institutions, with a wealth of choices before them, are not likely to be willing to undertake projects under public grants if they are deprived of the freedom of management which they consider necessary and would have in projects not governmentally financed. It is hardly an attractive prospect for a research scientist to be forced to divert time from scientific inquiry to appear before a court or even a university board to justify such decisions

as his refusal to allow a participant in his research project to make what he considers a premature and ill-advised publication;[6] even less inviting is the prospect that the hearing board, in construing what it deems to be its constitutional mandate, may require him to allow such publication. Congress has specified one constitutional command, a prohibition of racial discrimination, which those engaging in federally financed projects must respect. This very specification affords some indication that the Government did not mean to require compliance with other constitutional guarantees; we do not think the Constitution imposes them *proprio vigore.*

At argument appellant's counsel called our attention to *McQueen* v. *Druker,* 438 F.2d 781 (1 Cir. 1971). Dealing with a low and moderate income housing project under § 221(d)(3) of the National Housing Act, 12 U.S.C. § 1715*l*(d)(2), the court held that a landlord who had received the very substantial aid which the federal program provided could not evict a tenant whose lease had not been renewed because of the tenant's "associational activities" on behalf of fellow tenants; the court avoided passing on further claims with respect to what, if any, notice and hearing in addition to normal state court eviction proceedings would be required in cases not presenting what the court considered a valid First Amendment defense.

We are not here required to decide whether we would follow *McQueen,* despite our holding in *Langevin* v. *Chenango Court, Inc.,* 447 F.2d 296 (2 Cir. 1971), that tenants

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6 We recognize that many private universities have established boards to pass on the discipline of students and to make employment decisions regarding untenured faculty. Developments in the Law—Academic Freedom, 81 Harv. L. Rev. 1045, 1101-04, 1157-59 (1968). But these are flexible measures voluntarily adopted by the schools themselves. Furthermore, plaintiff's position would necessarily entail that decision of such a board with respect to a project financed by a federal grant would be subject to at least some judicial review.

under the same program were not entitled to a hearing on a rent increase which the FHA had approved.[7] The government involvement in a § 221(d)(3) project is arguably greater than under a NIH grant. The basis of the holding in *McQueen* was "that at least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches," 438 F.2d at 784-85. See also *Joy* v. *Daniels*, 479 F.2d 1236, 1238-39 (4 Cir. 1973). As previously indicated, there is no similar circumscription of decision-making here. Coming to our second criterion, we think the offensiveness of refusing to renew a lease in retaliation for a tenant's efforts to protect his rights and those of his fellows, see 438 F.2d at 785 and n.8, considerably outruns the action of a principal investigator in controlling publication by a subordinate—even if, as Dr. Wahba asserts, Dr. Ochoa's interest was to have his name included.[8] Finally, there is much less possibility of harm to a § 221(d)(3) project by prohibiting eviction because a tenant has engaged in "asso-

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7 The *McQueen* decision, handed down some five months previously, was not brought to our attention by the parties in *Langevin* and we were not aware of it. Our result accorded with the First Circuit's decision with respect to rent increases in *Hahn* v. *Gottlieb*, 430 F.2d 1243 (1970), involving the same project as *McQueen*, although we reached it by a different path. For a full discussion see, without connotation of full approval, Note, Procedural Due Process in Government-Subsidized Housing, 86 Harv. L. Rev. 880 (1973).

8 While this issue of fact—strongly contested by defendants—could not be decided on a motion for summary judgment, we note that many publications listed in applications to NIH, including some in which Dr. Wahba was an author, did not include Dr. Ochoa's name. Strong proof would be needed to warrant a conclusion that a scientist whose name was on scores of publications would be vitally interested in one more.

ciational activities" for the benefit of tenants, than in loading a basic research program with the full panoply of First Amendment and Fifth Amendment due process rights. *McQueen*, whether we ultimately follow it or not, thus does not dictate reversal here.

We mention a final point, only to avoid any suggestion that we have implicitly ruled upon it. Unlike the plaintiff in *McQueen* who somehow was allowed to spin a violation of 42 U.S.C. § 1983 relating to action under color of *state* law, and consequent jurisdiction under 28 U.S.C. § 1343(3), out of *federal* involvement, a mystery not discussed by the court,[9] Dr. Wahba has forthrightly placed his case under the principle of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), with jurisdiction resting on the general federal question section, 28 U.S.C. § 1331. Although the *Bivens* Court did not rule out the possibility of private damages actions for violation of other constitutional rights by federal officers, the decision was limited to violations of the Fourth Amendment. Mr. Justice Harlan, concurring, was at pains to note that "the experience of judges in dealing with private trespass and false imprisonment claims supports the conclusion that courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights," whereas this "may not be true with respect to other types of constitutionally protected interests, and therefore the appropriateness of money damages may well vary with the nature of the personal interest asserted," 403 U.S. at 409 and n.9. We need say only that we regard the question as open.

Affirmed.

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9 The district court had made an attempt at explanation, 317 F. Supp. 1122, 1133 (D. Mass. 1970), but we find this rather unconvincing.

APPENDIX B – OPINION OF UNITED STATES DISTRICT COURT

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERT J. WAHBA,

Plaintiff,

-against-

NEW YORK UNIVERSITY AND
SEVERO OCHOA

Defendants.

KNAPP, J.

This action was brought by plaintiff, a biochemist, to recover punitive damages for his allegedly unconstitutional dismissal from the faculty of the New York University School of Medicine. Jurisdiction rests on 28 U.S.C. Section 1331. Defendants move for summary judgment or judgment on the pleadings on the limited ground that their dismissal of the plaintiff does not rise to the level of state action and therefore that plaintiff's claim that he had been denied due process of law must fail. Oral argument was heard on June 1, 1973. For the reasons that follow, the motion — treated as one for summary judgment — is granted.

The relevant facts are essentially undisputed. In January 1963 plaintiff was hired as an instructor in the Biochemistry Department of the New York University

School of Medicine, and rose to the level of assistant professor the following September. In January 1966 he became research associate professor and worked on a research project within the Biochemistry Department funded by a National Institute of Health grant from the U.S. Department of Health, Education and Welfare. Throughout the relevant period defendant Ochoa was Chairman of the Biochemistry Department.

In June 1969 plaintiff addressed a symposium sponsored by the Cold Spring Harbor Laboratory of Quantitative Biology on the topic of the research being done in the New York University Biochemistry Department, and subsequently submitted for publication in the Cold Spring Harbor Symposia an article describing that research.

The facts from this point on are clouded by acrimony, but — as they are not material to the question of state action — suffice it to say that a heated dispute arose between plaintiff and defendant Ochoa as to the propriety of plaintiff's submission of the manuscript without prior approval by Dr. Ochoa, as a result of which plaintiff's appointment was not renewed for the coming academic year. Plaintiff subsequently joined the faculty of the University of Sherbrooke School of Medicine in Canada.

Plaintiff contends that the decision not to renew his contract represents a violation of his academic freedom and of his Fifth Amendment rights not to be deprived of his property without due process of law. Whatever may be the merit of this contention, a finding of state action must

precede any determination of it, and I find myself precluded from making such finding by both the precedents and the undisputed facts.

Plaintiff's assertion of "state action" (both parties use that expression as a term of art, although the governmental involvement at issue is federal rather than state) rests solely on the fact that the research project on which plaintiff was working and from which the data in the fateful article was derived, was federally funded. Plaintiff does not allege that the grant would not have been awarded to the New York University Biochemistry Department but for his appointment, as indeed the grant was an ongoing one whose inception predated plaintiff's appointment.

Naturally enough, the federal government imposed certain conditions on the beneficiaries of its largesse. Among those conditions were compliance on the part of the recipient institution with Title VI of the Civil Rights Act of 1964; disbursement of the funds solely for the project approved; continued responsibility on the part of the principal investigator (defendant Ochoa) for the conduct of the project; and frequent submissions of various fiscal reports. See 42 C.F.R. Sections 5223, 5224. Absent was any requirement that procedural due process be afforded to any participant in the project who might be severed from it.

Plaintiff takes the position that defendant Ochoa became an agent of the government by virtue of his accountability to it as principal investigator for the

project, and thus that his allegedly arbitrary action amounted to state action. In addition, plaintiff urges that defendant New York University was performing a "public function" which transformed it into an arm of the state.

As I read the cases, they do not support a finding of state action based on facts such as these.

The leading case in this Circuit is *Powe v. Miles* (1968) 407 F.2d 73, very recently reaffirmed in *Grafton v. Brooklyn Law School et al*, 73-1098, decided May 24, 1973. In *Powe*, students suspended from Alfred University as a result of their participation in a demonstration urged that their suspensions constituted "state action" and consequently were void for failure to comply with due process requirements. Judge Friendly in rejecting the students' argument stated that the essential point in regard to state action is that "the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury . . . .State action would be . . .present here with respect to all the students if New York had undertaken to set policy for the control of demonstrations in all private universities . . .But the fact that New York has exercised some regulatory powers over the standard of education offered by Alfred University does not implicate it generally in Alfred's policies toward demonstrations and discipline." 407 F.2d at 81.

Judge Friendly did find that the suspensions of three students registered in the New York State College of Ceramics on the Alfred campus constituted state action "for the seemingly simple but entirely sufficient reason

that the State has willed it that way" by enacting various legislation to retain significant control over the Ceramics College. (at 82).

Plaintiff seeks to analogize his position at New York University to that of the Ceramics College students in *Powe*, in that the federal government could "in the last analysis tell [NYU] not simply what to do but how to do it" (Powe at 83) just as the state could have controlled the Alfred Ceramics College. I find his position more analogous to those of the liberal arts students whose suspensions were held to be private rather than state action. The involvement of the government in the case at bar did not extend to the dictating of policy regarding procedures by which faculty should be hired or fired. See *Mulvihill et al v. Butterfield Memorial Hospital et al* (S.D.N.Y. 1971) 329 F. Supp. 1020.

Were plaintiff alleging some form of discrimination on the part of defendants, the very degree of governmental involvement I now hold insufficient to "carry on its back" the particular constitutional rights here advanced might well "rise to the level of 'state action'." *Grafton v. Brooklyn Law School, supra* at 3757. Happily no such allegation has been made in this case. Summary judgment is accordingly granted in defendants' favor.

Dated:

New York, New York
June 12, 1973

WHITMAN KNAPP,
U.S.D.J.

APPENDIX C – SUPPLEMENTAL ORDER OF KNAPP, D.J.

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERT J. WAHBA,

Plaintiff,

-against-

NEW YORK UNIVERSITY AND
SEVERO OCHOA,

Defendants.

On June 12, 1973 I granted summary judgment in favor of defendants. It now appearing that defendants' counterclaim was not necessarily dismissed by my ruling and is still pending, I hereby expressly determine that there is no just reason to delay entry of final judgment in favor of defendants on the complaint, and direct that such final judgment be entered, pursuant to F.R. Civ. P. 54(b).

IT IS SO ORDERED.

Dated:

New York, New York
July 19, 1973

Judgment Entered
July 25, 1973

s/ Raymond F. Burghardt
Clerk

s/Whitman Knapp
WHITMAN KNAPP, U.S.D.J.